

APPEAL NO. 030729
FILED MAY 15, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 22, 2003. The record was held open until February 3, 2003. The hearing officer resolved the disputed issues by deciding that the appellant (claimant) sustained a compensable injury on _____; that the claimant did not suffer any periods of disability due to the compensable injury prior to the date of the CCH; and that the respondent (carrier) did not waive the right to dispute the injury and did so within 60 days of first written notice of the injury after initiating benefits in accordance with the Texas Labor Code. The claimant appealed only the determination that the carrier did not waive the right to dispute compensability. The claimant argues that the waiver determination is against the great weight and preponderance of the evidence and is wrong as a matter of law. The compensable injury determination and disability determination were not appealed and have become final. Section 410.169. The appeal file does not contain a response from the carrier.

DECISION

Reversed and rendered.

The carrier acknowledged on the Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) that it received written notice of injury on May 8, 2002. The TWCC-21 was dated June 27, 2002. The hearing officer specifically found that the claimant had not accrued any income benefits prior to the dispute filed by the carrier and that the carrier paid medical benefits for the claimant subsequent to the injury and prior to disputing the claim. However, the evidence does not reflect that the carrier took any action within 7 days of receiving written notice of the injury. Section 409.021 provides that the insurance carrier is to begin the payment of benefits or notify the Texas Workers' Compensation Commission (Commission) and the claimant of its refusal to pay benefits within 7 days after receiving written notice of the injury (the "pay or dispute" provision).

In Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003, we focused on the language of the Texas Supreme Court in Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002) and determined that the carrier is required to take some action within 7 days of receiving written notice of the injury in order to be entitled to the 60-day period to investigate a claim and deny compensability. It cannot simply sit back and rely on the fact that benefits did not accrue prior to the date it filed its dispute to argue that it did not waive its right to contest. Texas Workers' Compensation Commission Appeal No. 030663-s, decided May 1, 2003. Although the record shows that the carrier did pay medical benefits in this case, the record does not contain any evidence that the carrier took some action within 7 days of receiving written notice. Therefore the hearing officer's determination that the

“[c]arrier did not waive the right to dispute the injury and did so within 60 days of first written notice of the injury after initiating benefits in accordance with the Texas Labor Code” is in error.

The claimant additionally appeals the finding that “Commission [r]ules prohibit [c]arrier from filing a TWCC-21 solely for the purpose of stating benefits will be paid as accrued.” We note that Tex. W.C. Comm’n, 28 TEX. ADMIN. CODE § 124.2(j)(1) (Rule 124.2(j)(1)) provides that “[e]xcept as otherwise provided by this title, carriers shall not provide notices to the Commission that explain that: (1) benefits will be paid as they accrue[.]” However, the Commission recognized the potential for problems in situations where benefits do not accrue within the 7-day period after the carrier receives written notice. Advisory 2002-15, dated September 12, 2002, provided:

The Commission will continue to provide an acknowledgement of an insurance carrier's agreement to pay benefits as they accrue and are due. The insurance carrier must check the appropriate box in item number 1 on a TWCC-21 form (hereinafter referred to as "cert 21s") and forward the completed form to Texas Workers' Compensation Commission, 4000 S. IH-35, Cert 21s - MS 93A, Austin, Texas 78704. The acknowledged form will be returned to the insurance carrier via the insurance carrier's representative's box at TWCC's Central Office. Since the TWCC will not retain copies of these cert TWCC 21 forms, insurance carriers will be responsible for providing the TWCC acknowledged forms at any subsequent dispute.

In Appeal No. 030380-s, *supra*, the Appeals Panel noted that there has not been a legislative change to this section of the 1989 Act nor has there been a Commission rule promulgated to require an insurance carrier to notify the Commission or the claimant of its intent to pay benefits as they accrue and suggested that a carrier should take advantage of the “cert 21” procedure. A carrier that chooses not to utilize the “cert 21” procedure in instances where no benefits have accrued within 7 days of receiving written notice of the injury, and then later tries to assert that they “intended to pay in accordance with the 1989 Act but no benefits were due,” does so at its own risk.

We reverse the hearing officer’s decision that the carrier did not waive the right to dispute the injury and did so within 60 days of first written notice of the injury after initiating benefits in accordance with the Texas Labor Code and render a decision that the carrier waived its right to contest compensability under Section 409.021.

The true corporate name of the insurance carrier is **CASUALTY RECIPROCAL EXCHANGE** and the name and address of its registered agent for service of process is

**FRED S. STRADLEY
9330 LBJ FREEWAY, SUITE 1400, ABRAMS CTR.
DALLAS, TEXAS 75243.**

Margaret L. Turner
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Gary L. Kilgore
Appeals Judge